

No. 75-1586

Supreme Court, U. S.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1975

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**ROGERS BROTHERS WHOLESALERS, PETITIONER**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD  
IN OPPOSITION**

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**ROBERT H. BORK,**  
*Solicitor General,  
Department of Justice,  
Washington, D.C. 20530.*

**JOHN S. IRVING,**  
*General Counsel,*

**JOHN E. HIGGINS, JR.,**  
*Deputy General Counsel,*

**CARL L. TAYLOR,**  
*Associate General Counsel,*

**NORTON J. COME,**  
*Deputy Associate General Counsel,*

**LINDA SHER,**  
*Attorney,  
National Labor Relations Board,  
Washington, D.C. 20570.*

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 35a-37a) is reported at 526 F.2d 354. The Board's decision and order (Pet. App. 1a-34a) is reported at 218 NLRB No. 19.

**JURISDICTION**

The judgment of the court of appeals (Pet. App. 39a-40a) was entered on February 13, 1976, and a timely petition for rehearing was denied on March 15, 1976 (Pet. App. 59a-60a). The petition for a writ of certiorari was filed on April 29, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the evidence supports the Board's findings that the Company discharged two employees because of their union adherence, and not because of infractions of work rules.
2. Whether the Board properly permitted amendment of the complaint.

### STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are:

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

\* \* \* \* \*

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: \* \* \*

### STATEMENT

In early February 1974,<sup>1</sup> the Oil, Chemical and Atomic Workers International Union and its Local 4-243, AFL-CIO ("the Union") began an organizational campaign at the Company's optical laboratory in Beaumont, Texas (Pet. App. 9a). In early March, the Company became aware of the Union's organizational effort and responded

<sup>1</sup>All dates are in 1974 unless otherwise indicated.

with an anti-union campaign which included speeches, personal interviews with employees, and the dissemination of an anti-union letter (Pet. App. 10a). The Union filed charges with the Board alleging that the Company's conduct was coercive and violated Section 8(a)(1) of the Act. An unfair labor practice complaint was issued, but the proceeding was terminated on May 28, when the parties entered into an informal settlement agreement (Pet. App. 10a). On May 31, the Union and Company agreed to a Board-conducted representation election, to be held on June 25 (*ibid.*).

On June 4, Victor Rogers, one of the Company owners and the director of operations, made a speech to the employees in which he announced that employees would not be permitted to talk during working hours (Pet. App. 17a; Tr. 30-31, 305-307, 310-311).<sup>2</sup> Despite this announcement, several anti-union employees carried on conversations during work time without supervisory interference (Pet. App. 18a; Tr. 307-308, 311-313). However, on June 5, an active Union adherent, Aaron Cole, was discharged, allegedly for violating the no-talking rule (Pet. App. 15a-17a; Tr. 79, 418-419; RX 3). And, on June 13, another Union activist, Marie Cash, was indefinitely suspended, allegedly for insulting a fellow employee (Pet. App. 23a; Tr. 259-260, 432-434).

The facts surrounding these two incidents are as follows:

Aaron Cole, a Company lens grinder since June 1969, was an early participant in the Union organizational effort (Pet. App. 11a; Tr. 53, 55-58, 72-75). On March 11,

<sup>2</sup>"Tr." references are to the transcript of the unfair labor practice hearing; "RX" references are to the Company's exhibits therein. Copies of relevant portions of these materials have been lodged with this Court.

1974, Cole was summoned to a meeting in Supervisor George Wiebusch's office, attended by Rogers, Wiebusch, and Foreman Pete Boutte (Pet. App. 11a-12a; Tr. 61-62, 119-120). At the meeting, the management representatives requested that Cole lead employees toward the Company rather than the Union. Rogers also asked if Cole could get the "people's union cards back for him" (Pet. App. 12a; Tr. 62-67, 122-125). Cole refused to cooperate with the Company's anti-union efforts (Pet. App. 12a; Tr. 66, 125).

On June 5, Cole spoke to three fellow employees concerning arrangements to go bowling after work. After this conversation, Cole walked to the water fountain where Foreman Clifford Richard met him and reprimanded him for talking on the job (Pet. App. 15a-16a; Tr. 75-77). Richard stated, "we don't want you back there talking to nobody. You know, we just don't want you back there" (Pet. App. 16a; Tr. 77). Later that day Cole was summoned to Supervisor Wiebusch's office and asked to explain what had happened at the water fountain. After listening to Cole's recitation of the incident, Wiebusch discharged Cole for "talking too much on the job" (Pet. App. 16a; Tr. 77-79, 418-419; RX 3).

Employee Marie Cash was an active and visible Union supporter. She wore a Union button, attended Union meetings, and was one of the first employees to wear a T-shirt at work that bore the caption, "VOTE UNION" (Pet. App. 21a; Tr. 252-254, 265). On June 13, during the morning coffee break, Cash was seated in the lunchroom, wearing her Union T-shirt (Pet. App. 21a-22a; Tr. 255). Another employee, Beverly Deculus, who was seated at the next table, looked over at Cash and said, "Why don't they send that damned Frenchman back to

France?"<sup>3</sup> (Pet. App. 22a; Tr. 255, 268-269). Cash replied, "What about you, coon ass?" (Pet. App. 22a; Tr. 255, 269). Deculus left the room and Cash called after her, "coon ass trash"<sup>4</sup> (Pet. App. 22a; Tr. 256, 269). Another employee, Nettie Stanford, then told Cash that she objected to the term "coon ass trash" and did not want to hear her use it again because she, Stanford, was a "coon ass" too (Pet. App. 22a; Tr. 256, 371).

Shortly after this incident, Wiebusch summoned Cash to his office and asked her to explain what had happened (Pet. App. 23a; Tr. 257, 430-431). Although Cash told Wiebusch that she did not consider the term "coon ass" to be dirty, Wiebusch said that he was going to suspend her (Pet. App. 23a; Tr. 259). Cash asked Supervisor Freddie Fredieu, who was present at this meeting, why nothing had been done when Olive, another employee, had called Cash a bitch (Pet. App. 23a; Tr. 258-259). Wiebusch interrupted and told Cash that she was suspended "to give [her] time to think about it" and the Company would call her (Pet. App. 23a; Tr. 259, 260, 432). Cash left the room crying and, pausing at the door, said "don't bother" (Pet. App. 23a; Tr. 260, 263, 276-277, 432). The Company never recalled her (Pet. App. 23a; Tr. 260).

On these facts, the Board found that the Company violated Section 8(a)(1) of the Act by its discriminatory enforcement of the no-talking rule. The Administrative Law Judge, whose decision was adopted by the Board, explained (Pet. App. 19a):

<sup>3</sup>Deculus knew that Cash was of French origin (Tr. 278).

<sup>4</sup>"Coon ass" is a term used among the "Cajuns" in Louisiana, the state from which each of these employees came. The term, which is roughly synonymous with the term "Cajun," is not opprobrious, but the addition of the word "trash" made it offensive (see Pet. App. 22a, n. 7; Tr. 359, 371-372, 373).

[A]lthough non-union employees were permitted to circulate and converse without hindrance or reprimand from supervisors who had to be aware of their activities, similar activities on the part of Cole led to his immediate discharge within a few days of partner Victor Rogers' announcement that the rule would be enforced. A no-solicitation rule of this nature can remain valid only if it is enforced without discrimination.

The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by invoking the rule as the basis for discharging employee Cole. The Law Judge, whose findings were adopted by the Board, rejected the Company's assertion that Cole's poor job performance led to his discharge. The Judge stated (Pet. App. 18a):

Clearly [Cole] was a difficult employee, arrogant and outspoken on occasion and quick to defend what he conceived to be his rights. Equally clearly he was not discharged because of his low production or high breakage. This had been a continuing situation for all of the 5 years for which he worked for Respondent and obviously had not been sufficient to cause Respondent to discharge him until he evidenced interest in the union organizational movement. \* \* \*

Finally, the Board, adopting the findings of the Law Judge, found that the Company violated Section 8(a)(3) and (1) of the Act by indefinitely suspending Cash because of her Union activity. The Law Judge found that, while the Company "had a strong policy against 'ungentlemanly' and 'unladylike' language in the plant," "evidence adduced by the General Counsel reveals that in the past warnings were given to employees and discharge was not the immediate outcome" (Pet. App. 22a-23a). He concluded that the difference in treatment between

Cash and other employees who had indulged in similar conduct "resulted from the union status of Cash and [the Company's] demonstrated antiunion animus" (Pet. App. 24a). The Law Judge added that, "[u]nder the circumstances I do not believe that Respondent should be entitled to escape the consequences of its unlawful act by withholding further employment from Cash, who testified that she wants to go back to work for Respondent, because in her anger and dismay at her discriminatory suspension she told Respondent not to bother to call her" (*ibid.*).

The Board ordered the Company, *inter alia*, to reinstate Cole and Cash with backpay (Pet. App. 30a). The court of appeals, in a *per curiam* opinion, upheld the Board's decision and enforced its order (Pet. App. 37a). The court stated (*ibid.*):

It is our conclusion that, although the evidence is in sharp conflict, this case involves credibility judgments that are best resolved by the trier of fact and the agency that possesses expertise in this area. Accordingly, since there is substantial evidence to support the findings, conclusions and order of the Board, and no other reasons having been shown to disestablish the validity of these actions, the order is due to be enforced. \* \* \*

#### ARGUMENT

1. As petitioner admits (Pet. 2), the basic question raised by the petition is whether substantial evidence on the whole record supports the Board's evidentiary findings that Cole and Cash were discharged for union adherence, rather than for violation of Company rules. Such an issue does not warrant review by this Court, where, as here, the court of appeals has sustained the Board's findings. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 490-491.

In any event, as shown above, the credited testimony amply supports the Board's findings. Petitioner essentially objects to the Law Judge's credibility determinations.<sup>5</sup> However, there is no showing that the Law Judge abused his broad power to make credibility resolutions in rejecting the testimony of Company supervisors concerning enforcement of the no-talking rule. Cf. *National Labor Relations Board v. Walton Mfg. Co.*, 369 U.S. 404, 408.

Petitioner's further contention (Pet. 13-14) that Cash quit her job, and therefore the Company has no duty to reinstate her, is based on the Company's premise that her suspension was lawful. The Board, upheld by the court below, found to the contrary. Since Cash's emotional response—"don't bother"—was brought on by the Company's unlawful conduct, the Board properly held that the Company could not rely on that statement in refusing to reinstate her. Cf. *National Labor Relations Board v. International Van Lines*, 409 U.S. 48, 53.

2. Petitioner's objection (Pet. 6-7) to the Law Judge's allowance of an amendment of the complaint to allege as background incidents matters subject to the settlement agreement (*supra*, p. 3; Pet. App. 7a-8a) is without merit. It is clear that the Board may go behind a settlement agreement where, as here, there were subsequent unfair labor practices. *Wallace Corp. v. National Labor Relations Board*, 323 U.S. 248, 253-255.

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<sup>5</sup>The Law Judge credited the testimony of two employees that anti-union employees were not disciplined for talking on the job (Tr. 307-308, 309-313), and rejected the denials of two Company supervisors (Tr. 527-528, 532-533) that they had observed such conversations (Pet. App. 18a).

# CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,  
*Solicitor General.*

JOHN S. IRVING,  
*General Counsel,*

JOHN E. HIGGINS, JR.,  
*Deputy General Counsel,*

CARL L. TAYLOR,  
*Associate General Counsel,*

NORTON J. COME,  
*Deputy Associate General Counsel,*

LINDA SHER,  
*Attorney,*  
*National Labor Relations Board.*

JUNE 1976.